SERVED: June 20, 1994

NTSB Order No. EA-4183

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 25th day of May, 1994

DELYLE R. MASON, Applicant, v. DAVID R. HINSON, Administrator, Federal Aviation Administration, Respondent.	)	Docket No. 158-EAJA-SE-12837

OPINION AND ORDER

Applicant has appealed from the decision of Administrative Law Judge William R. Mullins dismissing his EAJA[1] application.[2] We deny the appeal.

The law judge issued his decision dismissing the Administrator's emergency order of revocation on November 16,

[1]Equal Access to Justice Act, 5 U.S.C. 504.

[2]A copy of the law judge's decision is attached.

1992. No appeals were filed. Applicant's EAJA application was filed on December 28, 1992. The sole question before us is whether the law judge was correct in dismissing the December 28 application as late filed.

Recently, in Holloway v. Administrator, NTSB Order EA-4155 (served May 3, 1994), we addressed the application deadline EAJA contains. We stated (at 2):

> EAJA, at § 504(a)(2), reads, as pertinent:
>
> > A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application . . . .
>
> Waiver of sovereign immunity "must be strictly construed in favor of the sovereign" and not "enlarged beyond what the statute requires." Escobar v. U.S. I.N.S., 935 F.2d 650 (4th Cir. 1991). Expansion of statutory time limits amounts to an enlargement of the waiver of sovereign immunity. Monark Boat Co. v. NLRB, 708 F.2d 1322 (8th Cir. 1983). In light of this analysis, the courts have uniformly held that EAJA'S 30-day time limit is jurisdictional and may not be waived. Monark, supra; Sonicraft, Inc. v. NLRB, 814 F.2d 385 (7th Cir. 1987); Columbia Mfg. Corp. v. NLRB, 715 F.2d 1409 (9th Cir. 1983).

Emphasis in original.

Our rule, at 49 C.F.R. 826.24, mirrors EAJA in requiring that an application be filed no later than 30 days after the Board's "final disposition" of the proceeding. And we have defined "final disposition," as pertinent here, as the date on which an unappealed initial decision becomes administratively final. See 49 C.F.R. 826.24(c)(1). The question presented in this case, then, is whether the EAJA application was filed within 30 days of when the initial decision became administratively

final.

The Administrator contends that the EAJA application was due 30 days after the date any appeals were due, i.e., 30 days from November 18, 1992.[3] The EAJA application thus would have been due December 18. Applicant contends that the EAJA application was due 30 days after the 20-day period the Board has given itself, under 49 C.F.R. 821.43, to take review on its own motion, i.e., December 7, 1992, thus making the EAJA application not due until January 6, 1993, and his application timely filed.

Resolution of this dispute depends on whether the rule at § 821.43 applies to emergency proceedings, as that rule has been interpreted to mean that the 20-day period in which the Board may take review on its own motion establishes the "final disposition" date, rather than the shorter 10-day period for filing of notices of appeal in non-emergency cases.[4] However, there is no similar provision in our emergency rules (§ 821.54, et seq.) for review on the Board's own motion, and nowhere in the emergency rules is this concept adopted by reference. On the contrary, the emergency rule corresponding to § 821.43 states succinctly that, if no appeal to the Board by either party is filed within the 2-day time allowed, the initial decision shall become final. See § 821.56(d).[5] Sections 821.56(d) and 821.43 are thus

[3]Appeals were due in 2 days, per § 821.57(a).

[4]See Doyle v. Administrator, 4 NTSB 780 (1983).

[5]Accordingly, while Doyle v. Administrator, 4 NTSB 780 (1983), may be instructive, it is not directly on point, as it did not involve an emergency order, but simply interpreted

inconsistent and incompatible and the specific emergency rule is logically understood to preempt the more general non-emergency provision.

Thus, applicant's theory is not at all supported by a reasonable reading of the rule itself. There is nothing in § 821.56(d) to suggest that some time period beyond the time the parties have to appeal, especially a time period in a rule not referenced, should be considered. And, given the very compressed deadlines adopted throughout the emergency rules, it would be odd indeed to assume the importation from the non-emergency rules of this comparatively leisurely period for discretionary review which, if exercised, would require the filing of briefs and the issuance of a final decision in a matter of a few days.[6] Therefore, we decline to find the rule ambiguous, as applicant urges.[7]

(..continued)
§ 821.43 to hold that, in light of its provision that the Board may choose to review an initial decision on its own motion within 20 days, the initial decision, in the absence of a timely appeal within 10 days, could not become administratively final until that 20 days had run.

[6]We have proposed to eliminate the 20-day period for Board consideration of own-motion review. Aviation Rules of Practice -- General Revisions, notice of proposed rulemaking published 58 FR 54102, 54103 (October 20, 1993).

[7]Respondent suggests that advice from a Board employee supports a conclusion that the rule is ambiguous. For the reasons already discussed, we can see no ambiguity, and note further that the involved Board employee, by affidavit, denied offering any advice or information of the sort alleged. The definition of final disposition might, perhaps, be interpreted in a particular case, still consistent with the statutory timeliness limitation, so as not to penalize an innocent party for relying on incorrect advice given by the Board. However, we are not convinced from applicant's presentation that this is such a case,

Moreover, and contrary to applicant's claims, applying the provisions of § 821.43 here would be inconsistent with statutory obligations. The entirety of the 60-day emergency order program is premised on the fact that, because emergency orders are made effective immediately, hearings on their validity should be accomplished expeditiously so that the possibility of the deprivation of airman privileges without due process of law is minimized. Speed then is meant as a safeguard of the rights of airmen. A 20-day waiting period in cases not appealed is inconsistent with this design. It would lead to the possibility that in a case lost by the Administrator but not appealed that the Administrator would still be within his rights to defer return of a certificate during the 20-day period necessary to bring finality to the law judge's decision. Such a delay would be entirely at odds with the statutory design.

We affirm dismissal of this application. And, in light of our disposition, we need not consider applicant's supplemental application.[8]

(..continued)
especially given the rule's clarity, nor does it appear that applicant is here arguing that equitable reliance justifies accepting his application.

[8]The law judge is directed, consistent with this decision and precedent, including Doyle, to refrain from using, or to correct the errors in, the attachment to his order, entitled APPEAL FROM EAJA DECISION AND ORDER.

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicant's appeal is denied; and

2. The initial decision is affirmed.

VOGT, Chairman, HALL, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.